Supreme Court, U.S.
FILED
NOV 2 1998
CLERK

(3)

No. 98-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

CHARLOTTE MCKENNA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' opposition suffers from one overriding flaw. It largely ignores *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). This Court specifically noted in *Easterwood* that the Federal Railroad Safety Act ("FRSA") pre-empted not only state statutes and regulations, but also state standards arising from common law duties, where federal law covered the subject matter of those standards. Respondents nonetheless insist that the FRSA does not pre-empt their common law tort claims against KCS. They are wrong.

1. This Court observed in *Easterwood*—a case which, like this one, involved a common law state tort action against a railroad—that the FRSA's pre-emption provisions extended equally to "[l]egal duties imposed on railroads by the common law." 507 U.S. at 664; *see also*

49 U.S.C. § 20106 (pre-empting any state "law, rule, regulation, order, *or standard* relating to railroad safety" when federal regulations substantially subsume subject matter of state law) (emphasis added); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 520-523 (1992) (federal statute barring additional "requirements * * * imposed under state law" pre-empted common law claims). Thus, because federal regulations "covered the subject matter" of the *Easterwood* plaintiff's common law negligence claim that the train was traveling at excessive speed, this Court concluded that the claim could not go forward. 507 U.S. at 675. And because the FRSA provides only for civil penalties, *see* 49 U.S.C. § 20111, the plaintiff's claim for damages in tort was necessarily extinguished with her underlying claim. *See* Pet. 18.

The trial court in this case acknowledged *Easterwood*, but refused to follow it. While the court agreed with KCS that there were "loads of federal regulations that have to do with what it is this Defendant did and their claims against this Defendant," Pet. App. 3a, it nonetheless was "not persuaded that the federal statutes would preempt the state tort law claims." *Id.* 5a. In its view, FRSA pre-emption of plaintiffs' tort claims "would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts." *Id.* The court accordingly denied KCS's motion for judgment on the pleadings, ruled that plaintiffs should be allowed "the opportunity to pursue a remedy based on state law claims," *id.*, and—in direct contravention of *Easterwood*—forced KCS to defend itself against thousands of clearly pre-empted state tort claims.[1]

[1] Respondents suggest that the trial court "was concerned by the fact that discovery was on-going and that all of the myriad of allegations made by the Plaintiffs were not preempted by federal regulation." Opp. 2-3. This assertion is belied by the court's comments and ruling on KCS's pre-emption claim.

2. To justify the trial court's decision, respondents, like the trial court, ignore the teaching of *Easterwood*. They instead advance the proposition that because the FRSA's pre-emption provision does not expressly state that common law tort claims are pre-empted under that Act, their claims may proceed. *See* Opp. 4-7. *Easterwood* established that that proposition is wrong. *See* 507 U.S. at 664; *see also Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903-904 (8th Cir. 1998) (state common law negligence claim pre-empted under FRSA); *Elrod* v. *Burlington N. R.R.*, 68 F.3d 241, 244-245 (8th Cir. 1995) (same); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 562-563 (10th Cir. 1995) (same); *O'Bannon* v. *Union Pacific R.R.*, 960 F. Supp. 1411 (W.D. Mo. 1997) (same). Even *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 91 (Ohio 1994), a case upon which respondents heavily rely,[2] recognizes that "in the appropriate case, a state common-law tort claim can be within the preemptive reach" of the FRSA.

Each and every claim in plaintiffs' complaint falls well within FRSA's "preemptive reach," *id.*, because a dense network of federal railroad safety and hazardous-materials transportation regulations substantially subsumes the subject matter of each of plaintiffs' claims. *See* Pet. 6-7, 15-17 (discussing breadth and detail of federal regulations and application to plaintiffs' claims).[3] Under the

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[2] *See* Opp. 4, 5-6, 8-9, 14. Respondents also rely on a twenty-year-old district court case, long since superseded by this Court's decision in *Easterwood*, for their assertion that the FRSA "does not prohibit citizens from bringing tort claims for injuries." Opp. 13; *see also id.* 11-13 (quoting extensively from *Southern Pac. Transp. Co.* v. *United States*, 462 F. Supp. 1193 (E.D. Cal. 1978)). This Court's decision in *Easterwood*, of course, gives the lie to that statement. If federal regulations cover the subject matter of a common law tort claim, that claim may not go forward.

[3] Respondents suggest that KCS based its pre-emption arguments "on its assertions that the extensive nature of the regulations establishes that Congress *impliedly* intended to preempt state tort law

clear dictates of *Easterwood*, the trial court was required to dismiss plaintiffs' common law tort claims.

3. Respondents also completely ignore the second, independent ground on which the state trial court's ruling contradicted *Easterwood*. Because the court erroneously concluded that plaintiffs' request for damages circumvented the FRSA pre-emption statute, the court did not address plaintiffs' claims individually, instead issuing a blanket denial of KCS's motion for judgment on pre-emption grounds. But as KCS pointed out, to determine whether a complaint containing multiple claims is pre-empted under the FRSA, a court must examine each individual claim to determine whether federal regulations cover the subject matter of that claim. *See* Pet. 21; *Easterwood*, 507 U.S. at 665; *Cipollone*, 505 U.S. at 523-524 (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Bryan*, 154 F.3d at 901-904 (analyzing each claim of negligence separately for FRSA pre-emption). Because plaintiffs' individual claims against KCS involved several different subject matters—namely, the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous materials employees, and proper public-sector notification and emergency procedures—*Easterwood* required the trial court to address and resolve KCS's pre-emption defense as to each claim.

4. Finally, respondents point to a Louisiana court of appeals case to justify the decision below. That case proves only that Louisiana—the other state currently over-

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claims." Opp. 5 (emphasis added). Not so. The bulk of KCS's petition was devoted to its argument that the *express* pre-emption provisions of the FRSA applied to respondents' common law tort claims, under the clear dictates of *Easterwood*. *See* Pet. 6-8, 15-17 (noting that federal regulations substantially subsume the subject matter of each of plaintiffs' claims); *compare id.* 20 n.16 (discussing grounds for finding implicit FRSA pre-emption, even apart from express preemption).

seeing a massive, and clearly pre-empted, tort action against KCS—has ignored *Easterwood*'s dictates more than once, and confirms the need for review by this Court. In *In re New Orleans Train Car Leakage Fire Litigation*, 671 So.2d 540 (La. App. 1996), *writ denied*, 675 So.2d 1120 (La.), *cert. denied*, 117 S. Ct. 512 (1996), the court of appeals was asked to determine whether the FRSA pre-empted a claim arising under La. Civ. Code art. 2315.3, the state punitive damages statute. Although *New Orleans Train Car* involved FRSA pre-emption, the court of appeals simply adopted the reasoning of an earlier case involving pre-emption under the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*,[4] concluding that because the FRSA's penalty provisions and the state damages statute had "different purposes," claims under the damages statute survived FRSA pre-emption. 671 So.2d at 546. This was clear legal error under *Easterwood*. *See* Pet. 18-19.

* * * *

For the foregoing reasons, and for those in the petition, the petition should be granted.

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[4] In *Haydel* v. *Hercules Transport, Inc.*, 654 So.2d 418 (La. App.), *writ denied*, 656 So.2d 1019 (La. 1995), the court of appeals reviewed the HMTA's pre-emption provisions in light of a state tort claim for punitive damages under the same article of the Louisiana Code. Substantively different from those of the FRSA, the HMTA's pre-emption provisions provide that a state requirement is pre-empted by federal law if complying with the state requirement is "not possible," or if the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125. A state law "not substantively the same" as the federal statutes or regulations is also pre-empted under the HMTA if it addresses, *inter alia*, the classification, packing, and shipping of hazardous materials. *Id.* § 5125(b); *see also* Pet. 9 n.7 (discussing HMTA pre-emption provisions).

Respectfully submitted,

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